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Supreme Court, U.S.
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Case No. 96-957

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

MELVIN JEFFERSON, individually
and as the Administrator of the
Estate of Alberta K. Jefferson;
LEON JEFFERSON; and BENJAMIN JEFFERSON,
Petitioners,

vs.

CITY OF TARRANT, ALABAMA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ALABAMA SUPREME COURT

REPLY TO BRIEF IN OPPOSITION

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19 pp

QUESTION PRESENTED

Whether a claim for money damages against a municipality in the State of Alabama, brought pursuant to 42 U.S.C. §1983, will lie where death has resulted from the constitutional deprivation complained of. The issue presents itself because 42 U.S.C. §1983 does not contain a survivorship provision. This "gap" is closed by 42 U.S.C. §1988 which states that where the civil rights statutes are deficient in providing a remedy, "The common law, as modified and changed by the Constitution and statutes of the state wherein the Court having jurisdiction of such civil or criminal case is held, *so far as the same is not inconsistent with the Constitution and laws of the United States*, shall extend to and govern . . ." 42 U.S.C. §1988.

In a case brought in Alabama, the survivorship provision that becomes operative pursuant to §1988 is the Alabama Wrongful Death Act. Ala. Code §6-5-410 (1975). The Alabama Wrongful Death Act has been held to provide for the recovery of punitive damages only. *See e.g., King v. National Spa and Pool*, 607 So. 2d 1241, 1246 (Ala. 1992). This Court, in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), has held that municipalities are immune from punitive damages. When presented with these precedents, the Alabama Supreme Court, following *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983), held that no §1983 claim survives, and plaintiffs proceeding in a death case against a municipality are left with a state law cause of action that limits damages to \$100,000.00 by Ala. Code §11-93-2 (1975), and that does not provide for the fees and expenses available to a prevailing §1983 litigant. The Alabama Supreme Court's decision presents the following issue: Is the application of the Alabama Wrongful Death Statute in such a way that it would bar §1983 actions against a municipality in any case where death is the result of the constitutional depri-

vation, leaving litigants with only a severely limited state law claim inconsistent with the Constitution and laws of the United States?

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I. *The Federal Question Raised By This Appeal Was Properly Raised In The Alabama Supreme Court.*

Respondent first argues that this Court lacks jurisdiction because Petitioners failed to comply with the "properly raised federal question" doctrine (Reply at 3). This argument is wholly without merit. The standard for determining whether an issue has been properly presented in the State Court is, "If the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). This has certainly been done in this case. There is no question that the federal issue of whether the Alabama Supreme Court's application of the Alabama Wrongful Death Act to death cases brought under 42 U.S.C. §1983 against municipalities is inconsistent with the Constitution and laws of the United States was properly raised in the Alabama Supreme Court.

The opinion below (Petition, App. A-1 to Petition for Writ of Certiorari) clearly states that the federal issue of whether the Alabama Wrongful Death Act has been applied in an unconstitutional manner regarding §1983 death claims against municipalities was the issue before it. In an attempt to avoid jurisdiction, Respondent argues that it was made aware that Petitioners relied upon the supremacy clause of the United States Constitution for the first time in the Petition for Certiorari. This is not true. Petitioner argued to the Alabama Supreme Court in support of the contention that the Alabama Wrongful Death Act has been applied unconstitutionally in this case that "the supremacy clause imposes on state courts a constitutional duty 'to proceed in such a manner that all the substantial rights under controlling federal law are protected'" (Brief to Alabama Supreme Ct., portions specifically arguing the supremacy clause attached as Appen-

dix A-I), citing *Felder v. Casey*, 108 S.Ct. 2302, 2313-14 (1988).

Petitioner went on to argue before the Alabama Supreme Court, citing *Howlett v. Rose*, 110 S.Ct. 2430, 2440 (1990) that "the supremacy clause forbids state courts to dissociate themselves from federal law because of disagreement with its content, or a refusal to recognize the superior authority of its source" (App. A-I). For Respondent to now argue that the supremacy clause was raised for the first time in the Petition for Writ of Certiorari is simply not the case.

Even if Petitioners did not specifically cite the supremacy clause below, this Court has jurisdiction because the issue was clearly argued below, and the Alabama Supreme Court based its decision on a federal issue. The jurisdiction of this Court "does not depend on citation to book and verse." *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 n.9 (1982). Even *Webb v. Webb*, 101 S.Ct. 1889 (1981), cited by Respondent, recognizes that there is no exact formula for raising an issue below. The requirement is that litigants have a reasonable opportunity to have the federal issue heard and determined. See, *Central Union Tel. Co. v. Edwardsville*, 269 U.S. 190-94 (1925). The *Webb* Court stated:

Although it would avoid uncertainty and the expenditure of much time and effort if litigants identified in the state courts precisely the provisions of the Federal Constitution or the federal statute they rely, we have not insisted on such inflexible specificity.

Webb, 101 S.Ct. at 1894. Respondent's argument is deficient for two reasons: (1) The supremacy clause *was* cited and relied upon by petitioner at the Alabama Supreme Court; and (2) even if it were not so specifically raised, there is no question that both parties had the opportunity to litigate the federal issue of whether the Alabama

Wrongful Death Act has been applied to 42 U.S.C. §1983 death actions in an unconstitutional manner.

Respondent's argument that Petitioner has failed to provide the Alabama Attorney General with notice that the constitutionality of Ala. Code §6-5-410 was being challenged is a similar red herring. First, Ala. Code §6-6-227 (1975) (App. A-II), which Respondent states placed a duty on Petitioners to notify the Alabama Attorney General of these proceedings, states that the Attorney General must be served "In any proceeding which involves the validity of a municipal ordinance, or franchise . . ." There is no municipal ordinance involved in this case. Similarly, the statute concerns only declaratory judgment actions, this is not such an action. As such, Ala. Code §6-6-227 did not place a duty on Petitioners to notify the Alabama Attorney General of the pendency of this action.

Similarly, Ala. R. App. P. 44(c) cited by Respondent does not apply to this case. The Rule states that if the validity of a "statute, executive or administrative order, municipal ordinance . . ." is raised, that service must be made (in the case of a state statute, upon the attorney general). This is not a case where the *validity* of Ala. Code §6-5-410 has been called into question. The Alabama Supreme Court's opinion clearly shows that the constitutionality of the Alabama Wrongful Death Act has never been questioned, only its application to a federally created right under 42 U.S.C. §1983.¹ As such, the duty

¹Even if the constitutionality of Ala. Code §6-5-410 were called into question here, the failure of the Alabama Attorney General's office to participate in the proceedings provides no defect. The comments to Rule 44 state that the failure to give notice is not fatal, but is an omission which will be supplied in accordance with subdivision (d) of the rule. Committee Comment, Ala. R. App. P. 44. Subdivision (d) of Ala. R. App. P. states that the appellate court will not rule until

of notification under Ala. R. App. P. 44(c) was not triggered in this case.

II. The Decisions By The Alabama Supreme Court In *Carter v. City of Birmingham*, And This Case Are Inconsistent With The Laws And Constitution Of The United States.

The Petition for Certiorari set forth the reasons that the Court's decision in this case, relying upon *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983), is inconsistent with the Constitution and Federal law. Respondent attempts to argue that the cases of *Brown v. Morgan County*, 518 F. Supp. 661 (N.D. Ala. 1981), *James v. Murphy*, 392 F. Supp. 641 (M.D. Ala. 1975), and *Pollard v. United States*, 384 F. Supp. 304 (M.D. Ala. 1974), somehow support its position. That is simply not the case. In *James*, the Court did not pass on the question. The *James* Court held only that when a claim is made on a death in Alabama under §1983, punitive damages must be pled. *James*, 392 F. Supp. at 646. Similarly, *Pollard*, is not on point. The holding in that case was that the state statute of limitations could act as a bar in a §1983 ruling. *Pollard*, 384 F. Supp. at 307. Obviously, there is no statute of limitations issue in the case at bar.

Contrary to Defendant's argument that "the federal district court in *Brown* has determined that the Court in *Brown* specifically abstained from offering an opinion on the issue *sub judice*, stating:

the notice contemplated by this rule has been given to the appropriate governmental body and the said governmental body or chief legal officer has been given such opportunity to respond as shall be set by the court." The Alabama Supreme Court did rule. Obviously, it too was aware that this case does not call into question the validity or constitutionality of the Alabama Wrongful Death Act, only its application to 42 U.S.C. §1983 actions.

The court notes that, in instances where a wrongful death action is brought against a municipality under 1983 in Alabama, the result reached in this case, coupled with the recent Supreme Court opinion in *City of Newport v. Fact Concerts, Inc.*, U.S. , 101 S.Ct. 2748, 69 L.Ed.2d 619 (1981), which held that municipalities for wrongful deaths caused by them in Alabama . . . Absent amendment, the court expresses no opinion on how the inconsistency would be remedied in Alabama death cases under 1983.

Brown, 518 F. Supp. at 664, n. 3. Moreover, both *James* and *Pollard* were decided before the decision in *Newport v. Fact Concerts, Inc.* As such, there was no decision on whether the complete elimination of a 42 U.S.C. §1983 claim against a municipality would be inconsistent with the Constitution and laws of the United States.

The only court to decide the issue in the case at bar, whether the Alabama Wrongful Death Act will be applied when its effect would be to totally eliminate §1983 claims against municipalities, is *Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986). The *Weeks* Court, as stated in the Petition for Certiorari, clearly held that "the strict application of the Alabama statute in such cases would result in the complete immunization of those entities from damages . . . [and] such a result would be inconsistent with the policies underlying §1983. *Weeks*, 649 F. Supp. at 1305.

Respondent next argues that the U. S. Supreme Court's decision in *Robertson v. Wegman*, 436 U.S. 584 (1978), stands for the proposition that a state statute which eliminates a cause of action based upon a state survivorship provision will not be inconsistent merely because it causes a plaintiff to lose litigation. In *Robertson*, the plaintiff died *after* the institution of the §1983 action, and its claim abated because there was no surviving rela-

tive who could maintain the action under the Louisiana survivorship statute. This was not considered inconsistent only because the deprivation of civil rights had no bearing on the death and subsequent abatement. The Court stated:

A different situation might well be presented, as the District Court noted, if state law "did not provide for the survival of any tort actions" [citation omitted] or if it significantly restricted the types of actions that survive . . . we animate no view, moreover, about whether abatement based on state law could be allowed in a situation in which deprivation of federal rights caused death.

Robertson, 98 S.Ct. at 1997. Contrary to defendant's contention, *Robertson* in no way holds that state law depriving a §1983 litigant of a cause of action arising out of said deprivation is not inconsistent with federal law and the principles of an underlying §1983. To the contrary, *Robertson* did stand for the proposition that where a state provision is inconsistent with the Constitution and laws of the United States, "state law may not be applied . . ." *Robertson v. Wegman*, 98 S.Ct. at 1995.

While Respondent argues that no inconsistency is created because a state cause of action remains, it cannot escape the fact that the remaining state law action is woefully inadequate. Recovery under the state law cause of action in this matter is capped at \$100,000.00 by Ala. Code §11-93-2 (1975). In 1997, such an award for a wrongful death is less than significant. Where the goals of §1983 are deterrence and compensation, *See, Weeks, supra*, a capped state law claim offers no adequate substitution for a §1983 claim.

This argument further ignores that the remedies provided for by §1983 are not substitutes for, but in addition to, state law remedies. "It is no answer that the state

has a law which if in force would give relief. The federal remedy is supplementary to the state remedy . . ." *Monroe v. Hape*, 81 S.Ct. 473, 482 (1961). The federal cause of action provides a uniquely federal remedy in *McFadden v. Sanchez*, 710 F.2d 907, 911 (2d Cir. 1983), the Court held that, "To whatever extent §1988 makes state law applicable to §1983 actions, it does *not* require deference to a survival statute that would bar or limit the remedies available under §1983 for unconstitutional conduct that causes death." As such, Respondent's argument that §1983 death actions against municipalities in Alabama ought to be eliminated because of an "adequate" state law remedy is not well taken.

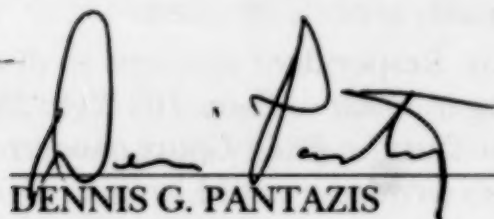
Lastly, Respondent attempts to distinguish this Court's holding in *Felder v. Casey*, 108 S.Ct. 2302 (1988), by pointing out that the *Felder* Court concerned whether a notice of claim provision could provide a limitation to a §1983 action, and this case involves the "adoption" of state law pursuant to the directions of 42 U.S.C. §1988 (Respondent's Opposition, p. 13). This is a difference without a distinction. Respondent cannot hide from the fact that the *Felder* Court refused to allow a state procedural statute to eliminate a claim under 42 U.S.C. §1983. *Felder* held that "a state law that immunizes government conduct otherwise subject to suit under §1983 is preempted, even where federal civil rights litigation takes place in state court, because the application of the state immunity law would thwart the congressional remedy." *Felder*, 108 S.Ct. at 2307. Similarly, an application of the Alabama Wrongful Death Act that would immunize government conduct otherwise subject to suit under §1983 is to be preempted where the effect would be to immunize Alabama municipalities from "a uniquely federal remedy against encroachments . . . upon rights secured by the Constitution and laws of the Nation . . ." *Felder*, 108 S.Ct.

at 2307, citing *Mitchum v. Foster*, 92 S.Ct. 2151, 2160 (1972).

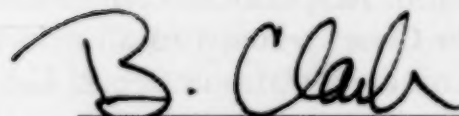
CONCLUSION

For the foregoing reasons, and for the reasons cited in the Petition for Writ of Certiorari on this case, the Petition is due to be granted.

RESPECTFULLY SUBMITTED,



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APPENDIX

IN THE SUPREME COURT FOR
THE STATE OF ALABAMA

MELVIN JEFFERSON, individually)
and as the Administrator)
of the Estate of Alberta K.)
Jefferson; LEON JEFFERSON;)
and BENJAMIN JEFFERSON,)

Plaintiffs/
Appellees,)

V.)

CITY OF TARRANT, ALABAMA,)
et al.,)

Defendants/
Appellant.)

) CASE NO.: 1941573

) CIVIL DOCKET
) NO.: CV 94-4523

APPEAL FROM THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

CIVIL ACTION NO. 94-4523

REPLY BRIEF OF APPELLEES, MELVIN JEFFERSON,
INDIVIDUALLY AND AS ADMINISTRATOR OF THE
ESTATE OF ALBERTA K. JEFFERSON; LEON
JEFFERSON; AND BENJAMIN JEFFERSON

ORAL ARGUMENT REQUESTED

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Supreme Court opinion in *City of Newport v. Fact Concerts, Inc.*, ___ U.S. ___, 101 S.Ct. 2748, 69 L.Ed.2d 619 (1981), which held that municipalities for wrongful deaths caused by them in Alabama . . . Absent amendment, the court expresses no opinion on how the inconsistency would be remedied in Alabama death cases under 1983.

Brown, 518 F. Supp. at 664, n. 3. *Gilmere* and *Weeks*, as well as *McFadden*, discussed below clearly show that the application of the Alabama Wrongful Death Act under *Carter* is inconsistent with federal law.

3. *Under U. S. Supreme Court Authority The Application Of The Alabama Wrongful Death Act Urged By Defendant Is Inconsistent With The Purposes Of §1983.*

While state courts may entertain §1983 actions, §1983 affords a federal cause of action for citizens deprived of the rights, privileges and immunities guaranteed by the Fourteenth Amendment by state agencies. *Monroe v. Pape*, 81 S.Ct. 473, 480 (1961). As stated explained *supra*, however, "where state courts entertain a federally created cause of action, the 'federal right cannot be defeated by the forms of local practice.'" *Felder v. Casey*, 108 S.Ct. 2302 (1988). That is exactly what Defendant seeks to do in this case.

In *Felder*, a motion to dismiss was granted a municipal defendant on a §1983 claim because the plaintiff failed to comply with Wisconsin's notice-of-claim statute. The Court held that the notice-of-claim statute could not act as a bar to a federal §1983 action. In reaching its decision the *Felder* Court held that,

Just as federal courts are constitutionally obligated to apply state law to state claims, *see Erie B. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82

L.Ed. 1188 (1938), so too the supremacy clause imposes on state courts a constitutional duty "to proceed in such a manner that all the substantial rights under controlling federal law are protected."

Felder, 108 S.Ct. at 2313-14, citing *Garrett v. Moore-McCormack Co.*, 63 S.Ct. 246, 251 (1942).

If the Alabama Wrongful Death Act is applied as Defendant urges, the substantial rights of equal protection denied Mrs. Jefferson cannot be remediated. The U. S. Supreme Court has stated that state courts are without such power curb those rights, stating that "The supremacy clause forbids state courts to dissociate themselves from federal law because of disagreement with its content, or a refusal to recognize the superior authority of its source." *Howlett v. Rose*, 110 S.Ct. 2430, 2440 (1990).

Defendant agrees that the Alabama courts are bound by the U. S. Supreme Court. Because the Supreme Court has held that a state law cannot vacate a §1983 claim designed to remediate constitutional wrongs, the Alabama Supreme Court is bound to find the application of the Alabama Wrongful Death Act as applied by *Carter* to be inconsistent with federal law. See, *Claflin v. Houseman*, 93 U.S. 130, 136-37 (1876) ("The laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as state laws are ...").